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September 8, 1954

In reply refer to
L/E

Dear Mr. Leonard:

Reference is made to your letter of September 12, 1957 regarding the case of Masatoshi Suzuki, et al. v. Tokyo Civilian Open Mess (D. J. No. 163-12-1) now pending in the Tokyo Court of Appeals, in which you request the negotiating history of Article XVIII, paragraph 2, of the Treaty of Friendship, Commerce and Navigation with Japan.

Examination of the official memoranda of conversations held at Tokyo during the period February 25, 1952 to March 11, 1953 in connection with the negotiation of the treaty indicates that the Japanese Government accepted the paragraph in question with very little discussion. A technical point which was raised in the course of the discussions related to the question whether the word "suit" referred to criminal as well as civil actions and whether the words "to which" modified the entire preceding clause in the provision or only the words "other liability". In replying, the United States representative stated that the purpose of the provision was to ensure that no special privileges were extended to publicly-owned or controlled corporations, etc., so that it was to be assumed that they would be held responsible for criminal acts. With regard to the other question, the United States representative stated that the "to which" clause referred to the entire preceding clause.

While the negotiating record is meager with respect to Japan, the negotiating history of this provision with other countries and the legislative history in the ratification proces

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assist in making clear the purpose and meaning of the provision. The Department has every reason to believe that the countries with whom the United States is in treaty relationship containing this provision understand its meaning in the same manner as we do.

The United States in proposing this provision was concerned with State trading. State trading has been and is understood to mean a publicly-owned or controlled enterprise engaged in international trade for a profit in competition with private interests. Normally this enterprise would take the form of a corporation or other association owned by the government engaged in what was traditionally a business carried on by private individuals. However, in some cases the enterprise might be organized as a subdivision of a government.

While it is recognized that there may be problems, should the interpretation of the provision in the Japanese-United States treaty become involved in litigation, in adducing evidence of the negotiating record involving a like provision in treaties with other countries, the information set forth below may be of assistance to you.

In the course of the negotiations with the Netherlands, the Dutch asked whether the Mutual Security Agency came within the purview of the treaty rule. The Department explained that the Agency was analogous to the Foreign Service and the State Department, and was not analogous to a business corporation engaged in commercial activity or activity for pecuniary gain; the Department explained that the function of the Mutual Security Agency was a high foreign policy function of public governmental character; the furnishing of grants and assistance to friendly countries for the humanitarian purposes of relieving impoverishment, and the politico-military purpose of restoring economic viability, promoting political stability, and building the underpinnings of military strength.

The Dutch also requested views regarding an entity such as a central bank. They feared that the Netherlands Bank might be subject to the provisions of this clause in the treaty. The United States explained that there can be said to be a presumption that a "Central Bank", which acts as an arm of the government in executing governmental monetary controls and fiscal policies, represents the government in its sovereign capacity, and is not a commercial or business enterprise within the purview of the provision. This presumption is of course rebuttable if the evidence in the instance of a given Central Bank does not bear it out.

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In another instance, in the course of negotiations with the Philippines in 1947 (which did not result in the conclusion of a treaty), the Philippine negotiators took the position that it should be made absolutely clear that the waiver of sovereign immunity did not extend to such agencies as the Philippine Purchasing Agency in New York. In attempting to clarify the intent of the United States proposal, State Department representatives stated that whereas their proposal would not disturb such immunities as might otherwise be enjoyed by the Quartermaster General in buying shoes for the army, a government bottling works that manufactured beverages for sale on the market would, on the other hand, be without immunity. It was stated specifically that "it is not proposed to use the treaty of friendship, commerce and navigation as a vehicle for giving the courts directives on the larger issues of sovereign immunity beyond the area delimited" in the proposed provision.

Finally, the following comment of the Senate Committee on Foreign Relations in its report on the United States-Uruguay FCN treaty should be noted (Senate Ex. Rept. No. 5, 81st Cong., 2d Sess., 1948, p. 6):

> "The treaty with Uruguay as well as the treaty with Italy took into account the trend in certain parts of the world toward government ownership of enterprises that are normally conducted by private capital. Provision is made in the treaty so that such enterprises shall not claim in the territory of the other party immunity from taxation or suit (Art. XVIII, par. 5), shall make purchases and sales solely in accordance with commercial considerations (Art. XIV, par. 1), and shall accord fair and equitable treatment to nationals, companies, and commerce of the other party with respect to government purchases of supplies and similar transactions."

We would be grateful to you if you could apprise us of the facts of the Suzuki case. It is possible that on analysis we could offer appropriate assistance as far as the issue of sovereign immunity is involved.

Sincerely yours,

Loftus Becker
The Legal Adviser

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